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Brian Havel

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MR. HAVEL: Ladies and gentlemen. I think we have had a fascinating day exploring the air transport industry in all of its many dimensions. I will close the conference with some remarks about the things we heard today. Some of the issues are very disturbing, and I am glad we have had a chance to talk about them.

Before September 11, 2001, whenever I attended aviation conferences, our practice was to have a fairly pleasant and erudite discussion about the importance of allowing Swissair to come into the United States to serve domestic routes like Chicago-Denver and New York-Los Angeles in competition with United and American. We debated those things even though we knew it was unrealistic because the British and the Americans would never agree on an open skies agreement and such has been the case.

Swissair, of course, at the time we were having these conferences, was the gold standard for international aviation service, and was, also, unfortunately, a pathetic, undercapitalized demonstration of the madness of supporting inefficient and overambitious flag carriers, if I may be permitted an untendentious legal remark. They now call it Swiss, by the way, which is the shortened form. What's in a name? But we do have to ask whether we can truly have the consolidation that we have been hearing about all day if carriers like Swissair can return to haunt us like vampires. The Americans are being accused by the Europeans of having easy Chapter 11 bankruptcy proceedings, which creates its own set of vampires, so it is an interesting juxtaposition and conflict.

† This is an edited version of the transcript from Professor Havel's closing remarks at the DePaul Business Law Journal Symposium, Terrorism, Security, and Competition: The Future of the Airline Industry, held on February 8, 2002.

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We could have been continuing our conversation today in the context we had before September Eleventh, talking about what is happening, for example, here at home in Chicago, including the long dispute in 2001 about congestion at O'Hare and the various merits of the Ryan plan and the Daley plan and O'Hare versus Peotone. Our friends from Australia may find that esoteric, but that is what was occupying our attention last year before September Eleventh. We could even have been talking, as I think Mary Schiavo tried to do at some length at lunch, about free flight, the revolutionary free flight program. Of course, the sponsor of that idea, James Fallows, surfaced like a vampire himself several times today and was quickly dispatched into the ether. But, on September 10, 2001, ladies and gentlemen, the aviation world as we knew it was twenty-four hours away from a cataclysmic reversal of everything that had gone before.

That is why we had this conference. That is why we have had this order of discussion here today. We have tried to do some serious thinking about the future of the airline industry. We have done it here today. We can talk about the runways at O'Hare, and we can talk about the massive international size and scope of our international travel and tourism industry, but then you hear, for example, that in the Grand Canyon in 2001, 1.5 million Japanese tourists came and flew into the canyon and took in the sights. In the year to date, 2002, how many Japanese tourists have shown up in the Grand Canyon? Fewer than 500. That is the dimension of the change we are talking about, and no matter how good this summer is, we are not going to get 1.5 million Japanese tourists to visit by the end of this year. They are going to be looking at the Grand Canyon through teleportation if we can invent it or video conferencing if we cannot, let me tell you. We have to get them back here on the airplanes.

We talked a lot today about September Eleventh, and Joe Schwieterman, speaking earlier, told us what he was doing on September Tenth. He was packing his bags, do you recall that, for a conference that never happened. There were other things happening that September Tenth, also. Loyola de Palacio, the EU commissioner for transport, announced that it was time to normalize the air transportation industry. It was time, she said, to end the vicious and regressive nationality rule that has hampered the liberalization of international aviation. She was talking about this on September Tenth. She has not mentioned it once since then.

On September Tenth, the Federal Aviation Administration (FAA) was hit with a district court ruling staying enforcement of a new rule on pilot hours that would allow pilots to stop their workday once they
reached sixteen hours, even if the flight were delayed by weather or some other mechanical glitch. That stay was obtained by none other than the Air Transport Association (ATA), the representative body of the U.S. airlines, which argued that enforcement of this rule, putting the pilots off-duty after sixteen hours, was too cost-prohibitive because it meant that the airlines would have to have another pilot standing by to replace the pilot who would go off duty. That was the kind of mentality, the kind of mind-set that existed before September 11, 2001, and, my goodness, look at how the cost (and cost benefits) of security shifted in those twenty-four hours and since.

The last thing I will mention about what was happening on September Tenth is that the Department of Transportation (DOT) criticized the FAA for not taking sufficient steps to protect its global positioning satellite, and I quote, "from attacks by groups hostile to the United States in a highly unlikely scenario." In a ghastly instant the next day, everything changed. Forget the terrifying prophecies of Nostradamus, of the twin brothers in the burning city. Our gaze must lift now to what we are going to do to restore the industry that we love and which, for many people in this room, is the source of their livelihood.

What our discussion here today showed is that there are two primary issues that dominate the discussion. One is flight safety and security and airport safety and security, and the other is the financial viability of the airlines. I mentioned earlier that Mike Whitaker and I are writing a new casebook on aviation law for publication in 2003—that is 2008 in academic time—and 2003 is a very important year in the industry. 2003 is a signature year in the international aviation industry. It is the 100th anniversary of the first flight by the Wright Brothers, and I hope that 2003 is a better year for aviation than 2001 was and than 2002 is scheduled to be, I am afraid.

When Mike and I met for our weekly authors' meeting on September 7, 2001, we agreed to insert in our chapter on security and safety the phrase, "America has the safest aviation system on the planet." That is still true if you are talking about how airplanes are serviced and how maintenance is done. Can we also say that America has the safest and most secure system of aviation on the planet? Can we say that after September 11, 2001? You may disagree with Mary Schiavo, but she had some controversial things to say which made me nervous about what is going on with security, and I felt the same way when Frank Costello was delivering his dire warnings.

The Europeans have retained the system of private screening at airports. It is so strange. Europe, the home of l'état capitaliste, the system where the government does everything, has privatized the
screening at airports, and we, living under George Bush, in the home of free enterprise, have now nationalized it. What are we thinking here? We are subsidizing the airlines, and we are nationalizing the screeners. Nothing like that is happening in Europe just now, but the Europeans claim and have claimed all the time that they have a better record of detection of violations, and they have, of course, taken the precaution of paying good wages to their screeners and not the ridiculous wages that we paid before September Eleventh. You could make more money flipping hamburgers at McDonald's at O'Hare Airport than you could screening baggage. You all know that and it is an absurdity.

Well, how do we cope with these security changes in an era when we still have rushed schedules, when we still have demands for convenience?; that is what Frank Costello was talking about. When we still have the road warriors. Mike, do people still talk about road warriors?

MR. WHITAKER: Not lately.

MR. HAVEL: Not lately. Road warriors, these are the heavy-duty business travelers, so ably parodied by Walter Kirn in his book last summer, *Up in the Air*, which I counsel you to read on your flights back, a very funny parody of pre-September Eleventh air travel, but perhaps not so funny now.

We all respond so quickly to those two little questions at the check-in desk, you know, which only cause amusement sometimes, when you are with your Dad, as I was, and Dad says, “No, I did not pack them myself,” and he looks for his wife and he is taken in for questioning because he is not listening to the questions. We have forgotten what the questions are. We do not care what they are.

By the way, do you know who invented those questions? Some low-level official at the DOT, and somehow they percolated up to the Secretary of Transportation, who put them into the regulations. Can you imagine over the years how often you must have thought to yourself, will this stop terrorism? Of course it won’t. And anyway none of this is any longer amusing. It is now a Federal violation, a felony, to say that you are carrying a bomb or a gun as you pass through the screening system. It used to be a misdemeanor, believe it or not, and if any of you have ever seen the movie *Airplane*, you will remember that this kind of action was parodied there. It was a joke in that movie, and it is something that I am sure Mary Schiavo was very unhappy to view when it came out to huge popular acclaim twenty years ago.
The airlines are reeling from these blows, absolutely reeling from these blows. The impact of having billions of people watch their magnificent jets commandeered in the most spectacular murder-suicide in history. What are we supposed to think about that as an industry? The airlines are desperately revisiting the mistakes of the past. Pilot training for hijacking before September Eleventh, as you well know, consisted of cooperation with the hijackers – where do you want to fly? Where should we take you? That is what it meant to cooperate with the hijackers.

Nobody anticipated the coming of the suicide mission to U.S. soil or, even more dramatically, that the terrorists would come into our borders carrying fake IDs, nothing more than the driver’s license Frank Costello had in his hand, and that they would train in our nation’s flight schools and they would learn how to fly, but not to land, a Boeing aircraft. It is disgraceful. It is disgraceful that that happened, and I was shocked that Mary Schiavo was telling us that it has happened before. She was reminding us of that at lunch.

The FAA is challenging every assumption that we made in this country about security, every assumption that we had made before September 11, 2001. Airport security is vital to all Americans – I am not just talking about the traveling public. Just as the airline industry is the highway for commerce, and everybody should be concerned about it, so too the security of the skies should be the concern of every American, every Australian, and every Canadian. Frank Costello talked about the intrusions on our civil liberties, and there will be intrusions on our civil liberties, on our privacy, whether we adopt schemes of surveillance or interception or those rather strange ideas called iris scans, or biometric smart cards, databases of suspicious names, FBI examinations of rental car records, hotel reservations and credit card slips, and trusted traveler or frequent flyer cards – whatever it is, we have to do it, and we have to be prepared to surrender some privacy. But as I heard the former director of security at Tel Aviv Airport saying only one week ago, the police have to be lucky every time, but terrorists only have to be lucky once, and I found that encapsulation to be the most chilling summary of our plight that I have heard since September 11, 2001.

Mike, I saw this in your recent article: the passenger screening system – for all that we complained about it before September Eleventh – did not fail. It did exactly what it was supposed to do, and the terrorists counted on it working. The terrorists could not have attempted what they did in a shopping mall in Minnesota. They counted on being able to enter those airplanes and to find there – courtesy of the
FAA – a gun-free environment, and that is exactly what they got. They got a gun-free environment, and they were able to pass by the underpaid screeners at the gate, who despite their occasional inattention, were actually doing their job under the system as it existed prior to September 11, 2001.

When Mary Schiavo waxes hyperbolic about what was going on before September 11, 2001, she should remember that that was the system, and it was working. She should remember that. All we failed to do, ladies and gentlemen, was to understand the psychology of our enemy. This is where I also disagree with her. She was talking about the Black September terrorist group of the 1970s, a very different set of circumstances, although it did lead to the introduction of the magnetometers and the detectors that we are so familiar with.

Well, the airlines obeyed the Federal regulations. It is true. The airlines, even under the new system that has been introduced and that was described by Frank Costello, still maintain primary responsibility for screening passengers. Now, think about that. You are not going to be facing government agents at all points. Mary Schiavo talked at lunch about staring into the eyes of the passengers. Well, let’s put it this way, and I find this amazing, despite all of the recommendations of the Gore Commission, despite all we have been through since September 11, 2001, we still ask the airlines to do counter-intelligence as part of their core business. We still ask the airlines to operate a police function when passengers are checking in and to treat all of their passengers as potential suspects. We ask them to do so much.

How far does deregulation have to go? Airlines are responsible for mechanical error, pilot error, and severe weather, and they pay the price for all of that. But the post-September Eleventh situation created a dramatic new responsibility by requiring airlines to look at all of the passengers to assess who are these people we are letting on board our aircraft.

Mr. Rapoport, I would ask only one question on the liability issue. If there had been no government intervention after September Eleventh on airline liability, would any airline CEO in the United States have bet his company on the proposition that a jury in New York City, where the Intifada is front-page news in the *New York Times* every single day of the week, would that CEO agree with you – would that jury in New York agree with you – that a terrorist suicide attack was not foreseeable? I do not think so. I think there had to be some help from the government on the insurance issue, and your remarks at the end of your speech about the airlines surviving all of this leave me skeptical.
The FAA is aware of all of this, although it has a terrible history, as everybody knows, of being slow to regulate. The FAA was very slow to introduce the changes in regulations with respect to the screeners. The screeners had twelve hours of training before September Eleventh. That is less than some of you work, as lawyers, every day—twelve hours in total to become screeners. In the year 2000, there was a mandate to increase that to forty hours, which is less than you work in a week. That mandate was never carried out. In fact, the FAA sat on a regulation on the certification of screening companies from 1996 until everything happened in 2001.

Congress told the FAA that it had to certificate these companies, and that it had to do it under the 1996 Act. The FAA never did so, and so by 2001, what did we get? We got nationalization of the baggage screeners, and the FAA is partly responsible for that because they failed to carry out the certification. So Ms. Schiavo is correct that there is some degree of dereliction of duty at the highest levels of government. We need to think creatively about the whole airport and aviation security system. It is not just a matter of abandoning curbside checking, and we have not abandoned it. I still see it. I thought it was gone, and yet I see it back all the time.

The reason that Mike Whitaker and I could declare in our book that aviation is safe is because the mechanical side of aviation has been made safe by a long series of careful investigations by transportation accident boards, which have adopted the rifle shot approach and not the shotgun approach, making sure that everything that happens in an air accident is carefully monitored, tracked, investigated, and then turned into proper conclusions and recommendations for action.

We had frightening news this week about that accident in Queens and the potential for the rudder to shear off if a pilot excessively manipulates it on takeoff. That is the kind of investigation that leads to better safety. I disagree with what Mary Schiavo says about her statistics. Flying remains the safest form of travel (other than elevators) on the planet today.

Let me be perfectly frank. We talk about screening for objects as passengers enter our aircraft. What we actually have to talk about is screening for motives. This is a delicate subject in the United States. It is the one that Frank Costello seemed to be hedging away from in his closing remarks. Instead of asking, “Did you pack those bags yourself?,” you ask “Who are you and where are you going and why are you going there?” You do that in addition to all of the information you get from iris scans and biometrics and all of those good things, but that is ultimately what you should be doing.
You should not be wasting your time as a check-in agent, and maybe I am asking the airlines to do too much again, asking people have you packed your own bags. You should be finding out who they are and where they are going. Let me tell you, Mary Schiavo was wrong if she thinks that trained agents cannot look into people’s eyes and get suspicious and do something about it. El Al has proven for years that you can stop passengers with explosives simply because of naïve answers or peculiar itineraries or simply, ladies and gentlemen, in the case of the male species, a jumping Adam’s apple. So there are low-tech ways to achieve high-tech results.

Are we passengers going to be deputized by the FAA to participate in this security regimen? That must be one of the reasons people are not flying. They are terrified of being asked to participate in some kind of hauling in of a hijacker. You know, for years the FAA has had regulations out there saying, do not smoke on aircraft, and there are still people who are hiding in the toilets setting off the alarms, but that is okay. Smoking on aircraft is not such a terrible thing. Well, we had the recent incident with the shoes, but that aside, it is not a terrible thing. It is something we can deal with.

But what are we supposed to think if our job is not just to avoid smoking, but is now to rush and to overpower our fellow passengers if we suspect them of potential terrorism? Oliver Wendell Holmes said, do not shout fire in a crowded theater. What if somebody shouts hijack in a crowded airplane? What constitutional rights and liberties are affected by that kind of process? Do not forget that, not a year ago, a mentally ill person rushed the cockpit on a Southwest flight in the United States and was beaten to death by his fellow passengers. What was the outcome, Mr. Rapoport? I am now being law professor. What was the outcome of that action? The District Attorney filed no charges and declared that reasonable force has been used. What kind of situation was it where a man was bludgeoned to death by the shoes of his fellow passengers? The process was quite obvious from the autopsy.

These are questions to think about in the new era. I am sure the airlines would recognize the changes to their business model that will come about because of security. I am sure, Mike, you will understand that if we do have the positive bag matching that we are supposed to be getting, it could cause conflict within the hub and spoke system. I am not sure that Southwest would be enormously happy about bag matching on its point-to-point system either, because it has got that twenty-two minute turnaround business model that it is so proud of.
We have 420 major airports in the United States. We have 670 million passengers per annum. Do we have a one-size-fits-all philosophy? It appears that we do under the new legislation, but everybody can opt out after three years, if they want to, and we can have a kind of wait-and-see approach. We still do not know what the answer is. We are still experimenting, and maybe that is a good thing. Congressman James L. Oberstar on PBS said there should be a new passenger facility charge for security. He said it should be called the September Eleventh charge, identified as such. What a way to scare away passengers. Anyway, it has not happened. One thing the airlines do not need is yet another charge on their passengers.

I agree with Mary Schiavo, by the way, that one of the problems we have in this country is that we forget what happened before. The ultimate best practice perhaps is to shut down the entire system, as we did between September Eleventh and September Thirteenth. One of those maverick commentators that you read sometimes in the newspapers said that if you are looking for an airline guaranteed never to crash and never to be a victim of terrorism, book Eastern, People Express, or Midway, because only airlines that never fly are guaranteed safe. Maybe he is right, but that should not stop us thinking of what to do with the airlines that are flying. We must not forget that this problem has not ended. The problem that Mary Schiavo has identified is that we do forget.

The New York Times last November, ladies and gentlemen, declared in an editorial – I could not believe it – that it was time to start thinking about anthrax. By the way, have you stopped thinking about anthrax? It is time to start thinking about anthrax because the airlines are coming back again. What nonsense. I did not see any correction published in today’s New York Times when the story appeared about the latest escapade with the axe in the cockpit. It is not over, and that is what comes about in our absurd media-driven short-term society, if I could make a nonairline-related remark.

Finally, with respect to financial viability, the airlines, even the giants of the deregulation era like United Airlines and American Airlines, are reeling from what has happened only two years – remember this – only two years after they made their biggest profits in history. This is staggering. My, those charts were amazing showing the cyclical volatility of this industry. United and American, as I pointed out in my question Mike, I think do see chilling similarities to Pan Am and TWA, from which they bought their Pacific and transatlantic routes. Ultimately, TWA was buried by American, which had already bought its routes. But today it seems to me there are no carriers around who
could buy those routes in a distress sale from United or from American. Well, maybe Southwest could, but Southwest does not want them; and, as Mike said, if Southwest does buy them, sell your Southwest shares, a good point, a good investment tip of the week.

Remember what happened in the last recession, 1989 to 1993. Some of you were not born in that recession. It was the Gulf War, and the recession that followed it. The world’s airlines lost $15 billion in those four years. For the American industry, it was more money lost than the entire industry had earned since the Wright brothers flew 100 years ago. Now, I say $15 billion lost in those four years. Ladies and gentlemen, last year, 2001, the world’s airlines lost collectively $12 billion. That is in one year. Congratulations, Qantas, on bucking the trend – may you continue to do so. Aren’t we as an airline industry supposed to be part of a capitalist free enterprise, profit-motivated economic system, Mike Whitaker? These kinds of losses were made by Leonid Brezhnev in his agriculture policy, and he was able to cover them up.

As Kevin Mitchell of the Business Travel Coalition pointed out, we are in the grip of the perfect storm, to use another popular reference. Recession plus a recent history of huge wage increases for pilots and mechanics plus the September Eleventh disaster, what a devastating combination. Here we have the airlines going cap in hand to the government, begging for money, just like Lee Iacocca and Chrysler in the bad old days of the quasi-socialist Carter administration in 1979. Mike says the reason that we have this bailout is because of a security failure, and you are right, Mike.

But the consequences of that action, of that failure, now make it look very seriously that private ownership of the airlines could be at risk. It has been obvious for years that we have a very peculiar airline system in this country, and it is similar overseas. The airports are in private or government hands. They are not owned by the airlines. There is no such thing as United Airport, and I think there should be, but it is not going to happen any time soon.

The government is involved deeply in safety, they will not deregulate safety, but they are involved through the FAA in the running of the airports also. The FAA is the best-known acronym on the planet after the FBI and the CIA, and now here comes the Transport Security Administration, the TSA. Well, we have that division of labor, and yet in the Lewis Carroll world that preceded September 11, 2001, the airlines were responsible for looking after your bags through the screening system with these underpaid operatives – a public system and a private system working in tandem. We have the regulators and
the regulatees, the deregulated airlines. It is a constant recipe for chaos and disruption. There are regulators in the room, and I do not want to offend them. But it has not been a successful marriage, and we have to bear in mind that these are some of the consequences.

The government may indeed be coming back. The Europeans are thinking about state subsidies to the airlines, and they are starting to talk ominously about structural aids. Mike said, and I agree with him, that there needs to be consolidation, with the network carriers on top, followed by elimination of the weak carriers – Swissair, Sabena, and my own home airline, Aer Lingus, sadly will disappear. The many transatlantic boutique carriers that are sucking the profitability out of the transatlantic routes will have to go, and we will see the rise of the low-cost point-to-points, the no-frills, as they call themselves, for example Jet Blue, and the wonderful new British Midland subsidiary, Be My Baby, which has started service in Britain. So we have a system of four or five of these major network carriers and the no-frills people and we eliminate the weak flag carriers. Who knows where they will go. But if things continue to deteriorate, if it is as serious as it appears to be, the government will step back in.

We could be back in the situation of regulation, national flags and the government paying the bill. A resurrected Civil Aeronautics board, and the government may re-regulate the airlines. Mike Whitaker in his article identified areas of the new bailout litigation where the government is tying its support to control over route exit. That is something to think about, route exit, the sine qua non of the regulatory system. Well, maybe the airlines are facing financial Armageddon, if the former chairman of United is to be believed, and obviously he was not because he was fired, but he did talk about financial Armageddon. The airlines may themselves favor a return to the safety net of government control over prices and routes. Mike was talking about that in his presentation. It would be ironic if the Europeans on the other hand were to continue their existing deregulation system with their very successful low-cost carriers like Ryanair and Easy Jet and letting the flag carriers like Swissair and Sabena and Aer Lingus dissolve into oblivion.

The shakeout in Europe would be very painful for those smaller flag carriers that Mike identified in red on his chart. There are reports, ladies and gentlemen, that the Irish government has had talks with Aeroflot about buying Aer Lingus. As someone commented in response to this, in a Western corporate finance office when anyone starts reaching for the Moscow telephone directory, that is a very bad sign. Good-bye, Aer Lingus.
So the aviation industry is facing its most challenging period in its history. We are going to have to make the industry more palatable for the businessman. Do that work on the trusted traveler program, cut out the hassle, do not make alternatives like video conferencing acceptable, and restore civility to the airline industry as best as you can, but do not think for a moment that the airline industry as we know it – the deregulated airline industry – will not vanish from this earth like the beasts of the Ice Age because it can. Industries can vanish in a true capitalist system.

Where today is the successful, thriving, popular, and much loved nuclear power industry of the United States? It is gone, and so too will be the deregulated airline industry if we are not careful, if we are not thoughtful. Airlines will never escape being a public utility. The industry, as I said earlier, has served not just the passengers, not just the air travelers, but the nation as a whole. Transportation Secretary Norman Mineta, and the new bailout statute that I mentioned earlier, talk about saving the national aviation system, not United, not American, not Continental, not Southwest. It is a fascinating public policy conundrum, but it is now a matter of the national security of every citizen of this country, and as a human rights lawyer, I would also say of every American’s right to travel.

Thank you very much. This concludes our Symposium. I want to thank all of our speakers for their wonderful contributions. Thank you to our moderator this morning, Mike Jacobs, and to you, ladies and gentlemen, and now let us adjourn for refreshments. Thank you.